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A Practitioner's Guide to General Order 95-10: Mediation Plan for the United States District Court of Nebraska

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Comment

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I. INTRODUCTION

> Discourage litigation. Persuade your neighbors to compromise whenever you can—point out to them how the nominal winner is often a real loser—in fees, in expenses, and waste of time.
>
> *Abraham Lincoln*[1]

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1. Edwin B. Wainscott & Douglas W. Holly, *Zlaket Rules and Alternative Dispute Resolution*, *in* LITIGATION 1993, at 631 (PLI Litig. & Admin. Practice Course Handbook Series No. 481, 1993). Wainscott and Holly also provide the following:

The judiciary, which once viewed private adjudication as an infringement on the jurisdiction of the courts, now sees alternatives as offering welcome relief to the courts while providing significant advantages to litigants.[2] Such alternatives[3] include negotiation,[4] mediation,[5] arbitration,[6] the summary jury trial,[7] early neutral evaluation,[8] the mini-trial,[9] reference procedures,[10] and med-arb.[11]

Because the proliferation of alternative dispute resolution programs has resulted in widespread interest in how they work and what they can be expected to accomplish, and because the United States District Court for the District of Nebraska has recently adopted General Order 95-10[12] directing federal judges to suggest certain cases for mediation, this Comment seeks to demystify the new Nebraska pro-

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> The notion that ordinary people want black-robed judges and well-dressed lawyers and fine courtrooms as settings to resolve their disputes is not correct.
>
> *Warren Burger*
>
> I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death.
>
> *Learned Hand*
>
> People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible.
>
> *Warren Burger*

Id.

2. A. Leo Levin & Deirdre Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29 (1985).
3. *See generally* JACQUELINE M. NOLAN-HALEY, ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL 1 (1992).
4. *See* NOLAN-HALEY, *supra* note 3, at 11-53.
5. *See* NOLAN-HALEY, *supra* note 3, at 54-118.
6. *See* NOLAN-HALEY, *supra* note 3, at 119-69.
7. *See* NOLAN-HALEY, *supra* note 3, at 170-79. The summary jury trial is a nonbinding process in which lawyers present a brief synopsis of their case to a jury which then renders a non-binding, advisory decision. *Id.* at 171. "[It] facilitates settlement by giving lawyers and their clients an advance assessment of what a jury might do in a given case." *Id.*
8. *See* NOLAN-HALEY, *supra* note 3, at 180-82. Early Neutral Evaluation involves early, systematic case assessment by a private attorney experienced in the substantive area of the dispute. *Id.*
9. *See* NOLAN-HALEY, *supra* note 3, at 191-92. "The mini-trial is a structured settlement process which can blend together some components of negotiation, mediation and adversarial case presentation. A mutually agreeable neutral advisor usually presides over the proceeding's two phases." *Id.*
10. *See* NOLAN-HALEY, *supra* note 3, at 199-200. These are more typically referred to as "rent-a-judge" or "private judging" because the litigants select and pay for the referee who is often a retired judge. *Id.* at 199.
11. *See* NOLAN-HALEY, *supra* note 3, at 200-01. This process involves the same person serving as both a mediator and an arbitrator in the same dispute. This "med-arb" is thereby present to ultimately make a decision in the case if the parties fail to settle on their own. *Id.*
12. *In re* Court-Annexed Mediation, General Order No. 95-10 (D. Neb. June 30, 1995) [hereinafter General Order 95-10].

cess. Part II begins by attempting to define mediation. Although commentators for the most part agree on what mediation is, there seems, at times, to be as many ways to proceed with a mediation as there are mediators. Part II continues with a brief discussion of the development of mediation in Nebraska, specifically in the United States District Court for the District of Nebraska.

Part III offers a practitioner's guide to General Order 95-10. It attempts to answer the question: What happens when a case that I am working on in the United States District Court of Nebraska, gets designated for mediation in lieu of litigation? Part III provides a step-by-step analysis tracing a case through the Nebraska system. Finally, Part IV briefly provides some advice to practitioners faced with federal mediation, and concludes that attorneys do play an important role in the mediation process—albeit a quieter one than they are used to performing.

II. BACKGROUND

Although Nebraska is developing a respectable reputation as a mediation supporting state, it has not been a leader in the development of alternative dispute remedies nationwide. In addition, the statewide mediation centers located in Nebraska are still new and unfamiliar to most Nebraskans, including lawyers, who do not understand the mediation process. Having not had the opportunity to learn about mediation in law school[13] or work with mediation in practice, many lawyers find themselves wholly ignorant of this new, exciting alternative dispute resolution process. The following definition and historical sections give a cursory overview to provide the reader with the minimum background necessary to understand this Commentary.[14]

13. To counter this shortfall, in the fall of 1995, the University of Nebraska College of Law included for the first time in its curriculum, a class entitled Alternative Dispute Resolution. The course covers the theoretical, practical, ethical, and legal issues confronted by mediators, arbitrators, neutral evaluators, and other dispute resolution specialists and the parties they serve. Among the issues covered in the course are confidentiality and privilege, conflicts of interest, finality/enforceability of resolutions, liability and ethical standards applicable to third parties, the extent of judicial review of decisions, arbitrability of disputes, international law, and public interest concerns. Disputes in a variety of settings are considered: family, employment, medical, commercial, criminal, and international. UNIVERSITY OF NEBRASKA COLLEGE OF LAW, UPPERCLASS REGISTRATION PACKET, COURSE DESCRIPTIONS 23 (Fall 1995).

14. For discussions of alternative dispute resolution processes and issues related to them, see generally NOLAN-HALEY, *supra* note 3, at 1; Sharon A. Jennings, *Court-Annexed Arbitration and Settlement Pressure: A Push Towards Efficient Dispute Resolution or "Second Class" Justice?*, 6 OHIO ST. J. ON DISP. RESOL. 313 (1991); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982); Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required*, 46 SMU L. REV. 2079 (1993).

A. Mediation Defined

Mediation is one form of alternative dispute resolution (ADR). Mediation is defined as a conciliation of a dispute through the non-coercive intervention of a third party.[15] "It is a process by which a neutral third party, the mediator, assists disputing parties in reaching a mutually satisfactory resolution."[16] While ADR consists of a host of alternative procedures to the traditional trial remedy,[17] the Nebraska Office of Dispute Resolution (ODR) focuses primarily on mediation.[18] Mediation is also the ADR technique chosen by the United States District Court for the District of Nebraska.[19]

Obviously, ADR is not the best remedy for every dispute. Mediation, for example, raises the overall best interests of the parties above the narrower legal issues of the case. Some disputes and litigants will remain, however, requiring the legal issues to take priority over any other interests. In these situations, a trial and its verdict may be the only alternative.[20] The purposes of ADR do not include eliminating the traditional adversary process.

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15. Levin & Golash, *supra* note 2, at 40. Traditional mediation demands the mediator adhere to very strict rules regarding the role he or she is performing. Neutrality and self-determination of the parties are two of the most important characteristics that the mediator must retain. *See* Jerry Spolter, *Checklist for Successful Mediation*, 49 DISP. RESOL. J. 26 (1994). *See also* Robert G. Boomer, *Making the Most of Court Ordered Mediation*, 49 DISP. RESOL. J. 17 (1994)(description of the typical court ordered mediation process); Joseph S. Hellman, *The Anatomy of a Mediation*, *in* LITIGATION 1993, at 97 (PLI Litig. & Admin. Practice Course Handbook Series No. 481, 1993)(outlining and defining basic mediation rules and process).
16. KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 16 (1994).
17. *See supra* notes 3-11 and accompanying text.
18. 1993-1994 NEB. OFFICE OF DISPUTE RESOLUTION SECOND ANNUAL REP. 1.
19. *See* General Order 95-10, *supra* note 12. Some federal courts have adopted, in addition to mediation, Early Neutral Evaluation programs to encourage settlement. *See, e.g.*, Linda Finkelstein & Nancy Stanley, *The Federal Angle*, 6 THE WASH. LAW. 32 (1992)(United States Courts for the District of Columbia Circuit); Daniel Wise, *Mediation Efforts in Federal Courts, In City Cases Yield Mixed Results*, 210 N.Y. L.J. 1 (1993)(United States District Court for the Eastern District of New York). No Early Neutral Evaluation plan exists for Nebraska federal courts.
20. For example, disputes such as domestic (divorce and custody), sexual harassment, and environmental cases may require a trial where the adversary process is the only way a fair and just result may be obtained. Leveling the playing field for the parties in any of these types of disputes is often necessary; however, traditional mediation and its rules of neutrality and impartiality forbid such interference by the mediator. Criminal cases have also not traditionally been assigned to mediation because of the constitutional parameters to which such proceedings must adhere. For discussions regarding whether mediation is appropriate in specific areas of the law, see Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992)(stating mediation perpetuates male dominance and does more harm than good to women's rights); Edward J. Costello, Jr., *The Mediation Alternative in Sex Harassment Cases*, 1992 ARB. J.

B. The Nebraska Dispute Resolution Act

"The resolution of certain disputes can be costly and time consuming in the context of a formal judicial proceeding[.]"[21] As a result, the Nebraska legislature passed the Dispute Resolution Act in 1991.[22] The Act created the Office of Dispute Resolution in the Administrative Office of the Courts/Probation to oversee the development of the practice and use of mediation in Nebraska.[23] The ODR is responsible for approval and funding of the six regional non-profit mediation centers throughout Nebraska.[24]

Mediation originally developed in Nebraska in response to the farm foreclosure crisis of the 1980s.[25] Farm mediation was later expanded to specific pilot projects and some civil issues.[26] With the assistance of grants from local churches, the State Department of Agriculture, and Legal Services agencies, and the untiring work of Kathleen Severens,[27] the Walthill Mediation Center was finally created.

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16 (suggests mediation is simpler, cheaper, quicker, and more frequently produces fair and just resolutions in sex harassment cases); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889 (1991)(critical assessment of mediation as well as other ADR techniques as they are used in federal courts regardless of substantive law context); Mori Irvine, *Mediation: Is It Appropriate for Sexual Harassment Grievances?*, 9 OHIO ST. J. ON DISP. RESOL. 27 (1993)(mediation of sexual harassment cases risks trivializing the seriousness of sexual harassment); Charlene Stukenborg, Comment, *The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts*, 19 U. DAYTON L. REV. 1305 (1994)("ADR techniques can prove to be useful in resolving environmental disputes.").

21. NEB. REV. STAT. § 25-2902 (Cum Supp. 1994).
22. NEB. REV. STAT. §§ 25-2901 to -2920 (Cum Supp. 1994).
23. OFFICE OF DISPUTE RESOLUTION, NEBRASKA MEDIATION: ANOTHER WAY TO RESOLVE CONFLICTS—THE WIN-WIN SOLUTION (pamphlet).
24. The six regional mediation centers are: 1) Central Mediation Center (CMC), Kearney, Nebraska (serves 31 counties throughout south central and southwest Nebraska); 2) Lincoln/Lancaster Mediation Center (LLMC), Lincoln, Nebraska (serves all of Lancaster County); 3) Metro Mediation Center (MMC), Omaha, Nebraska (serves all of Douglas and Sarpy Counties); 4) Nebraska Justice Center, Walthill, Nebraska (serves 24 counties in northeast and north central Nebraska); 5) Panhandle Mediation Center (PMC), Scottsbluff, Nebraska (serves 19 counties in western Nebraska); and 6) Southeast Nebraska Mediation Center (SENMC), Beatrice, Nebraska (serves 16 counties in southeast Nebraska). OFFICE OF DISPUTE RESOLUTION, MEDIATION TRAINING (1995)(pamphlet).
25. NEB. REV. STAT. §§ 2-4801 to -4816 (Reissue 1991)(Farm Mediation Act, originally enacted 1988). The original program was the Nebraska Farm Mediation Service. Telephone Interview with Kathleen Severens, Director of Nebraska Office of Dispute Resolution (Dec. 5, 1995).
26. Telephone Interview with Kathleen Severens, *supra* note 25.
27. Kathleen Severens is currently Director of the Nebraska Office of Dispute Resolution. She received a J.D. from the University of Nebraska College of Law in 1981 and began her legal career as a Reginal Smith Fellow, Community Property Lawyer. She then worked for two years for Legal Services, helping individuals with Native American legal issues on the Winnebago Reservation. Ms. Severens

Although farm and some civil disputes were the main focus in the beginning, as the new dispute resolution technique caught on other substantive law issues found their way to mediation.

Currently there are approximately 900 trained mediators in Nebraska.[28] Of this 900, approximately 350 are also attorneys.[29] Only attorneys are qualified to serve as mediators under General Order 95-10.

> An individual may serve as a [federal] mediator if he or she has qualified as a mediator under the requirements of the Nebraska Dispute Resolution Act, and in addition:
>
> (i) is an attorney in good standing in the state of Nebraska and in [the United States District Court for the District of Nebraska]; and
>
> (ii) has been admitted to practice law in any state for at least five years; and
>
> (iii) has completed not fewer than 15 hours of specialized training in mediating cases in federal court; and
>
> (iv) has completed at least three mediations supervised by an experienced mediator; and
>
> (v) agrees to accept cases referred pursuant to [General Order 95-10] and to abide by the provisions of [General Order 95-10] and the orders of the court, including the limitations on fees, in such cases; and
>
> (vi) agrees to act as a co-mediator in cases referred pursuant to this plan.[30]

The actual number of *qualified federal* mediators is thirty-seven.[31]

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transferred to the Farm Desk and Farm Crisis Hotline at Legal Services prior to her active pursuit of establishing mediation in Nebraska. In 1991 she was appointed by the Nebraska Supreme Court to her current position. Telephone Interview with Kathleen Severens, *supra* note 25.

Ms. Severens deserves much of the credit for the growth of mediation in Nebraska, as well as its continued success.

28. Of this 900, approximately 600 have completed the basic mediation training, and approximately 300 have the family training. Telephone Interview with Kathleen Severens, *supra* note 25.

29. *Id.* This means that many disputes are mediated by non-lawyers, often mental healthcare professionals. This aspect of the mediation is actually a very good one. The adversary process and the offering of legal advice can be very difficult for a practicing lawyer to remove from his or her arsenal when trying to non-coercively help two parties resolve their dispute. One who has not been trained in such combative techniques, although often not understanding the legal foundation on which the parties' agreement will be based, may prove to play the traditional mediator role much better. This may, in turn, lead to a greater sense of satisfaction in the parties over the dispute's resolution process and outcome.

30. General Order 95-10, *supra* note 12, at 4, 8.

31. United States District Court for the District of Nebraska, Approved Federal Mediator List (May 9, 1996 update). Although judges and magistrates have extensive experience with settlement conferences, these people are not the federal mediators. Lawyers who have been trained as *federal* mediators perform this role. But with the use of co-mediation, *see infra* notes 33-34 and accompanying text, individuals from all walks of life may train and participate in federal mediations.

This number is growing rapidly as more and more attorneys decide to become federal mediators.[32]

Because a large number of people have been generous in their support of Nebraska mediation and have shown an interest in learning the mediation process, almost every mediation to date has had co-mediators present.[33] Obviously as mediation becomes more sought

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For an interesting discussion about magistrates as mediators, however, see Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators*, 73 NEB. L. REV. 712 (1994).

32. To become a *federal* mediator in Nebraska, General Order 95-10 sets forth in pertinent part:

> A person desiring to serve as a mediator shall complete an application provided by the clerk of the district court which states in detail the applicant's experience as a mediator, including mediating disputes which were, at the time of the mediation, in litigation; the applicant's training; and the subject matter areas in which the applicant claims particular expertise or in which the applicant has significant experience. In addition, the applicant shall, upon acceptance of the application by the court, take [an] oath or affirmation . . . .
>
> Approval shall be effective for a period of five years, and reapplication shall be required after each five-year approval period. Subsequent applications shall require satisfactory performance in mediations referred pursuant to [General Order 95-10] . . . . No fee shall be charged by the clerk for initial applications; however, the clerk may charge a nominal fee to cover administrative expenses for processing subsequent applications . . . .

General Order 95-10, *supra* note 12, at 7-9.

Attorneys should seriously consider participating in the mediation system by becoming trained mediators and then providing this service. Obviously being a part-time mediator will not provide an abundant source of income, however, a legal professional offering time and resources to the court system *pro bono*, or at least at a reduced fee, is a great way to strengthen community and improve the public image of the bar. *See infra* note 110 and accompanying text.

The clerk of the district court maintains a current list of persons who have applied and met the requirements to serve as federal mediators under General Order 95-10. *See supra* note 31. This list is available to counsel and the public upon request. General Order 95-10, *supra* note 12, at 7.

33. The Nebraska Dispute Resolution Center co-mediators program usually pairs one experienced mediator with one training mediator. This doubling of resources for any single mediation is a very cost effective pedagogical method. It also makes a better mediation because it combines the two mediators' strengths and talents. Because only one of the mediators must meet the federal mediator criteria, the lead mediator often fills this role. Saying that the training co-mediator has "less" experience, however, may be misleading. Although possibly having less experience in federal court, the co-mediator may actually have more experience mediating. Telephone Interview with Kathleen Severens, *supra* note 25.

This is similar to what General Order 95-10 classifies as "co-mediation."

> Two co-mediators may be assigned in a particular case in accordance with the joint request of the parties and the approval, by order, of the judge, or, alternatively, at the discretion of the mediation center to which the case has been referred pursuant to [General Order 95-10]. Only one of such co-mediators need meet the criteria [to be a qualified federal mediator], but both must be qualified under the Nebraska Dispute Resolution Act.

out in Nebraska, limited resources will require this feature to be terminated except in special circumstances or very complex cases. For the time being, however, with the pool of possible mediators consisting of people from all walks of life and the ODR's practice of offering training and workshops in many different areas of disputes,[34] the immediate future of co-mediation continues to look very good.

C. Civil Justice Reform Act of 1990

Congress passed the Civil Justice Reform Act in 1990[35] to recognize the pressing need for procedural reform in light of the "pressures that a litigious society continues to place on the administration of justice in the federal courts . . . ."[36] The Act mandates certain procedural changes in U.S. District Courts in order to effectuate Rule 1 of the Federal Rules of Civil Procedure.[37] "Each federal district court is required to develop a comprehensive plan to reduce excessive costs and delays in an attempt to improve the system's over-all fairness and its ability to render justice."[38] "The plans must establish a case management tracking system where cases are assigned, after an early assessment, to the appropriate track which would operate under district and

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General Order 95-10, *supra* note 12, at 7.
In such a situation, both mediators may play primary roles in assisting the parties to mediate their dispute, or only one of the mediators may play an active role while the other observes and possibly critiques.

34. The ODR offers training for the following: basic mediation; migrant farm mediation; Native American court mediation; family mediation; Parenting Act mediation; multi-cultural mediation; family violence mediation; school mediation; special education mediation; and federal mediation. OFFICE OF DISPUTE RESOLUTION, MEDIATION TRAINING (1995)(pamphlet); ODR, ANNUAL REPORT, *supra* note 18, at 1-3.

35. Title I of the Judicial Improvements Act of 1990, H.R. 5316, designated the Civil Justice Reform Act, Pub. L. No. 101-650, 104 Stat. 5089, §§ 101-106 (codified at 28 U.S.C. §§ 471-482 (Supp. V 1993)) directs each federal district court to implement a "civil justice expense and delay reduction plan" to improve civil case processing. *See* Richard E. Lerner, *New Federal Dispute-Resolution Laws*, 206 N.Y. L.J. 3, 3 (1991).

36. Lerner, *supra* note 35, at 3 (quoting Representative Hamilton Fish, Jr., R-N.Y.). For another discussion regarding the mistaken perception of an overly litigious society, see former Vice President Danforth Quayle, Agenda for Civil Justice Reform in America, Address Before the American Bar Association (Aug. 13, 1991), *in* N.J. L.J., Aug. 29, 1991, at 15, 25. For the truth, see Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1980-81); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147 (1992).

37. FED. R. CIV. P. 1. Rule 1 states, "[The *Federal Rules of Civil Procedure*] shall be construed and administered to secure the *just, speedy, and inexpensive* determination of every action." *Id.* (emphasis added). Mediation is one way to achieve these goals.

38. Anthony G. Belak, *ADR in the Federal Sector*, 57 KY. BENCH AND B. 28, 28 (1993).

explicit rules, procedures, and time frames through the completion of discovery to trial."[39] "If a judicial district fails to enact a plan, the act imposes a model plan developed by the Judicial Conference of the United States and the Federal Judicial Center."[40]

Congress' intent at first was to fund twenty pilot programs around the United States.[41] There were to be ten programs run for a five year period and then ten more programs added to run for another five years.[42] After the ten year trial period had passed, reports were to be written analyzing the successes or failures of each program.[43] The Act has been widely welcomed. It saves judicial as well as party and attorney time and resources, gives self-determination,[44] and creates more satisfaction with both the court system and the legal profession as a whole.

The United States District Court for the District of Nebraska took a "wait and see what the reports say" posture when Congress first proposed the twenty pilot programs.[45] However, although all of the Congressional reports have not yet been completed, the United States District Court for the District of Nebraska decided in 1995 to develop its own mediation program.[46] Instead of simply adopting the Judicial Conference model, Nebraska developed its own plan based on different

39. *Id.*
40. *Id.*
41. Interview with the Honorable David L. Piester, United States Magistrate Judge for the District of Nebraska, in Lincoln, Neb. (Nov. 20, 1995).
42. *Id.*
43. *Id.*
44. Self-determination may be the most important factor of the mediation process. Many consumers of legal services today complain that they feel completely left out of the picture while their legal problems are being argued by their attorneys. Because of the complexities created by the numerous legal "technicalities", the client often believes he or she is only needed when the time comes to pay the attorney's bill. This belief is often furthered by a less than satisfying finished product and a client who does not understand how it was achieved. Mediation forces the parties themselves to get involved. Each party must think about and explain his or her problem to the mediator in his or her own words, listen to the other party's concerns, and make the tough decisions. Although this may often cause more immediate stress than simply handing the problem over to an unfamiliar attorney to be fixed, it results in clients who are much more satisfied which means a public who is much more forgiving of the legal system as a whole.
45. Interview with Magistrate Judge Piester, *supra* note 41.
46. If one were to believe everything she hears on television, she would think that *all* federal court dockets have been plagued with a litigation explosion. That is not true for Nebraska federal courts, however. The caseload in Nebraska federal courts reached its peak in 1992 and has gradually declined over the last three years. Because the caseload is actually declining, the Nebraska federal judges realized that there would be no better time than the present to implement the mediation program. Interview with Magistrate Judge Piester, *supra* note 41.

    All but one of the Nebraska federal judges had completed the forty-six hour mediation training in 1995. Nebraska is one of the few states where almost all of its federal judges have made such a progressive move.

aspects of the twenty pilot programs.[47] For example, Nebraska rejected the Judicial Conference model of requiring a mandatory mediation program. The Nebraska federal judiciary determined that implementing a flexible program of mediation was better for the beginning of mediation in Nebraska federal courts.[48] While this flexible approach seeks the input of the parties, the decision as to whether mediation shall be required remains with the court.[49]

General Order 95-10 creating Nebraska federal court mediation originally became effective as Order 95-01 on January 10, 1995.[50] On June 30, 1995, however, the judges realized some amendment of the original plan was necessary.[51] The amended order, General Order 95-10, became effective July 1, 1995.

General Order 95-10 reads in part:

> *Purpose.* It is the purpose of the court to provide mediation services with resultant savings in time and expenses to litigants and the court without sacrificing the quality of justice to be rendered or of the right of the litigants to trial in the event a voluntary settlement satisfactory to the parties is not achieved through the mediation procedure . . . .[52]

So the question that remains is, "How does Nebraska federal mediation actually work?"

III. TRACING A CASE THROUGH THE NEBRASKA SYSTEM

A. Types of Cases

Any type of dispute covering any substantive area of law may be suitable for mediation.[53] To date, the cases in Nebraska that have been designated for the new mediation program by the federal courts

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Although the Nebraska federal caseload actually went down before mediation was implemented, some federal courts do adopt mediation or other alternative dispute resolution techniques in response to *heavier* caseloads. *See, e.g.*, Finkelstein & Stanley, *supra* note 19, at 34 (criminal case filings were increasing dramatically causing civil litigants to suffer delays in United States Courts for the District of Columbia Circuit).

47. Interview with Magistrate Judge Piester, *supra* note 41.
48. *Id.*
49. Letter from Magistrate Judge to Counsel Regarding Procedure for Referral to Mediation (form-letter version on file with University of Nebraska-Lincoln College of Law Library) [hereinafter "Letter to Counsel"].
50. *In re* Court-Annexed Mediation, General Order No. 95-01 (D. Neb. Jan. 10, 1995).
51. The amending of General Order 95-01 should not be passed over lightly. It shows the federal judges' dedication and support for mediation in Nebraska, and possibly offers a glimpse into their future willingness to make changes as needed. Such flexibility will allow for continued improvement of federal mediation in Nebraska.
52. General Order 95-10, *supra* note 12, at 1.
53. As stated earlier in this Comment, criminal law has been excepted out of the mediation process because of the constitutional protections afforded to defendants.

have consisted of one bankruptcy,[54] three Federal Employers' Liability Act (FELA)[55] cases,[56] one non-prisoner civil rights case,[57] and a commercial/business case.[58] As General Order 95-10 became effective July 1, 1995, only a handful of federal cases have been able to complete the mediation process in Nebraska. As more individuals realize the benefits of selecting mediation over litigation, the number and variety of cases designated for mediation will no doubt grow exponentially.

Currently, the cases being referred[59] by the Nebraska federal judges to mediation fall into one of six categories.[60] These categories naturally reflect some of the characteristics of disputing parties that benefit from mediation over litigation.

> *Designation of Civil Cases for Mediation.* Any district, magistrate, or bankruptcy judge may by order refer a case to mediation when the judge finds that the nature of the case and the amount in controversy, together with the information available regarding the possibility of settlement make resolution of the case by mediation a practical possibility . . . .[61]

First, judges often refer cases to mediation where a continuing future relationship is necessary between the parties.

> Cases in which the parties are involved in an ongoing relationship which will continue after the resolution of the litigation . . . .[62]

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54. Unfortunately, no tracking system has been put in place by the Clerk's office for cases designated for mediation, so creating proper citations for them is virtually impossible. If asked, the United States District Court Clerk's office will be able to name one or two cases so that an interested attorney may look at a file to inspect the mediation related documents. However, the only relevant document in the file will be the mediation order; and if the inspecting attorney's case has already been designated to mediation, she will have received a similar mediation order.

    The bankruptcy case actually arose prior to the implementation of General Order 95-10. However, because the case was so perfect for mediation, the parties stipulated to using the mediation process.

55. 45 U.S.C. §§ 51-60 (1988).

56. *See supra* note 54 (no citation available because no tracking system).

57. *See supra* note 54 (no citation available because no tracking system).

58. *See supra* note 54 (no citation available because no tracking system). Although details about the case are sketchy, it resulted in successful mediation on approximately eight out of eleven issues. The three issues not settled were then rescheduled for trial. It was estimated that a sum of $70,000 had been saved on the mediated issues. Telephone Interview with Kathleen Severens, Director of Nebraska Office of Dispute Resolution (Dec. 7, 1995).

59. At the present time, mediation is not mandatory under General Order 95-10. The judge, parties, and their attorneys, decide together whether a case will proceed to mediation. However, when a federal judge instructs you that your case appears to be a prime candidate for mediation, it is probably in your client's best interests to try mediation.

60. The types of cases which may be mediated, however, are not limited to these six types. General Order 95-10, *supra* note 12, at 1.

61. *Id.*

62. *Id.*

A successful mediation settlement where both parties are satisfied with the outcome[63] allows the parties to continue their existing relationship without interruption. Instead of the complete end of a mutually productive relationship because of a disagreement over one transaction, the parties are able to save themselves from what might have become a very serious blow to their businesses. Because of the process, both also save face and reduce the risk of expensive litigation costs.

The second category of cases that Nebraska federal judges refer to mediation are those requiring the settlement of certain policy questions.

> Cases involving policy or practice questions that lend themselves to negotiation regarding actions or procedures to be taken in the future . . . .[64]

An example of such a case would be an employment situation where there is a policy need for an employee grievance process. Mediation could bring this to light and help create such a process. These cases will often include governmental entities such as county or school boards.

These types of cases are different from the resolution of *public* policy issues. Such public policy questions usually effect more than just the parties directly related to the dispute and are more likely to be settled in the traditional trial mode. The trial mode allows all parties in interest to fight for their own claims.

"Small claims federal court cases" make up the third category of cases designated to mediation.

> Cases in which the amount in controversy is determined to be less than $100,000 . . . .[65]

These disputes are ones where the plaintiff's alleged damages in the case are under $100,000, not the parties' combined damages. Other jurisdictions have decided that all cases over a certain amount will have the potential for designation to mediation or some other ADR process. Nebraska's federal judges, however, decided to try "less than $100,000" at the present time and see how the category works.

The fourth category of cases assigned to mediation are those where the damages obtainable are low compared to the litigation costs that would result if the dispute were to go to trial.

> Cases in which the litigation costs are high in relation to the amount in controversy . . . .[66]

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63. This is much more conducive to supporting a future relationship between the parties than a dispute resolution where one of the parties must be designated the "winner" and the other the "loser."

64. General Order 95-10, *supra* note 12, at 1.

65. *Id.* at 2.

66. *Id.*

A simple balancing test is applied comparing the parties' and judge's estimates of the time and other resources both parties will probably be required to invest against the possible return.[67] Often the federal judges can determine approximately how costly a particular litigation will be by studying the number of depositions each party states they need.[68] For example, if a party states she has ten expert witnesses, other lay witnesses, depositions of most of those people, and many of the witnesses reside throughout the United States and in three other countries, the federal judge's estimate of the litigation costs will be accurate enough to do a balancing against what the parties hope to gain.

Employment cases where the parties are still working together or negotiating may be also designated for mediation.

> Employment cases in which the parties have not previously engaged in conciliation proceedings . . . .[69]

Non-union teacher and some public employee firings usually fall into this category.[70]

Finally, cases where the United States is a party are sometimes designated for mediation.

> Cases to which the United States is a party and the parties to the litigation have not previously engaged in negotiations, work-out arrangements, or similar efforts.[71]

Across the United States, disputes arising with many federal agencies are now required to go to mediation before they are allowed to enter the traditional trial process.

B. Pleadings and Timing

The parties may decide when to pursue the mediation option. After approaching their attorneys, they may attend mediation before any pleadings are even drafted.[72] In many cases, however, the attorneys will not be able to provide their clients with sound legal advice until some discovery is completed or at least the pleadings are filed. Obviously, for the federal judges to designate a case for mediation under General Order 95-10, the pleadings must have been filed.

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67. Interview with Magistrate Judge Piester, *supra* note 41.
68. *Id.*
69. General Order 95-10, *supra* note 12, at 1.
70. Interview with Magistrate Judge Piester, *supra* note 41.
71. General Order 95-10, *supra* note 12, at 2.
72. Counseling clients about the mediation process alternative may be ethically required under both the *Model Rules* and *Model Code*. *See generally* Robert F. Cochran, Jr., *Must Lawyers Tell Clients About ADR?*, 48 ARB. J. 8 (1993)(analyzing the lawyer's responsibility to suggest ADR). Failing to do so could be considered malpractice. As mediation continues to develop, the bar will have no choice but to respond to these concerns.

> As soon as practicable after all defendants have answered the complaint, the court shall, after conferring with the parties and/or counsel by mail or otherwise, determine whether to designate the case for mediation.[73]

If a case falls under one of the six categories above or for any other reason would be a prime candidate for mediation, the Nebraska federal judges[74] will "definitely push it" to mediation.[75] Because General Order 95-10 is so new, the inertia of the trial court system is working against it. Because it is a voluntary program, federal judges will also attempt to get the parties' input before mediation is ordered, even going so far as allowing the parties to object.[76] In the initial scheduling letter that the parties receive from the magistrate informing the parties about *Federal Rules of Civil Procedure* Rules 26(a), 26(f) and 16(b),[77] the parties are asked in the course of their response to ad-

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73. General Order 95-10, *supra* note 12, at 2.

74. The magistrate judges are primarily responsible for assigning cases to mediation because they are responsible for most, if not all, scheduling order issues for the progression of federal cases. The continued use of the term "federal judges" in this Comment refers to magistrates as well as federal district judges because General Order 95-10 specifically states that "any district, magistrate, or bankruptcy judge" may refer a case to mediation. General Order 95-10, *supra* note 12, at 1. Realistically the magistrates will be the most active in mediation referral, making such decisions for every civil federal case except, of course, bankruptcy cases which will continue to be scheduled by the Bankruptcy judges.

75. Interview with Magistrate Judge Piester, *supra* note 41.

76. If the court on its own volition believes the case is appropriate for mediation, it will send the parties the Letter from Magistrate Judge to Counsel Regarding Procedure for Referral to Mediation. Letter to Counsel, *supra* note 49. Within fifteen calendar days of receipt of such letter, the lawyer for each party should write the undersigned judge a letter and send a copy to all other counsel of record, stating:

> (a) Whether [the lawyer and her client] believe [the] case is appropriate for mediation as proposed;
>
> (b) If [the lawyer or her client] believe [the] case is not appropriate for mediation as proposed, whether there is an alternative mediation proposal [the lawyer and her client] would like the court to consider, taking care to state the specifics of the proposal;
>
> (c) Whether the parties and counsel in [the] case have selected a private mediator, and if so, the expected completion date of the mediation; and
>
> (d) Such other concerns as [the lawyer] think[s] appropriate (including, but certainly not limited to, whether [the lawyer] ha[s] a preference regarding mediation centers).

Id. at 1-2.

Upon receipt of the aforementioned letters, the judge will review the positions of the parties and determine within forty days whether the court will enter an order requiring mediation. If the court decides not to enter an order requiring mediation, the parties will be notified accordingly. On the other hand, if the court decides to enter an order requiring mediation, the parties will receive an Order of Reference from the Clerk's Office. *Id.* at 2.

77. These federal rules govern discovery and scheduling.

dress on Official Form 35[78] whether the case is appropriate for mediation both at the present time or in the future. Receipt of Form 35 by the magistrate often marks the first time the magistrate will look carefully at the case. The parties should, therefore, take this first opportunity to list their reasons for or against mediation, because the magistrate will determine from the cursory information at hand whether the formal Letter from Magistrate Judge to Counsel Regarding Procedure for Referral to Mediation should be sent. Although the federal judges are working hard to overcome the trial court inertia toward mediation, the parties' suggestion not to pursue mediation may be sustained if it is reasonable, thereby continuing the case on the litigation track.

As an alternative to the court-annexed mediation plan, there may also be private mediators or mediation organizations available in the area.[79] For example, the Omaha Bar Association has a mediation project for private mediation.[80] If the parties choose to privately select a mediator after pleadings have been filed, the federal judges are likely to grant a stay to assist the parties in their use of the alternative dispute process.[81]

C. Mediation Center

Once the case has been designated for mediation, the judge shall enter an order staying all further proceedings pending the outcome of the mediation. The judge will also refer the case to one of the regional mediation centers established under the Nebraska Dispute Resolution Act. The docket sheet, the Mediation Reference Order, and most recent version of the pleadings will be sent to the mediation center.

> At such time the judge shall enter an order which shall stay all further proceedings in the case, pending the outcome of the mediation, and refer the case to one of the regional mediation centers established under the Nebraska Dispute Resolution Act.[82]

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78. FED. R. CIV. P. 84 (Appendix of Forms, Form 35). Form 35 has not yet been revised to include an explicit request for information regarding the parties' discussions about attempting mediation. However, such information logically fits under the paragraph reading:

> Settlement [is likely] [is unlikely] [cannot be evaluated prior to (date)] [*may be enhanced by use of the following alternative dispute resolution procedure*: [_____].

Id. (italic emphasis added).

79. Letter to Counsel, *supra* note 49, at 1.

80. *Id.* Private mediation may require more work for the parties than mediation under the court plan. In private mediation, for example, arrangements and fees must be individually negotiated, whereas under General Order 95-10, the fees are capped at $100 per hour and are to be shared by the parties. *Id. See also infra* section III.F.

81. Interview with Magistrate Judge Piester, *supra* note 41.

82. General Order 95-10, *supra* note 12, at 2.

Determinations of which mediator will be assigned to any single case is based on, inter alia, the complexity of the dispute, the attorneys' preferences, and who the mediation center chooses.

> The mediation center shall select a mediator from among those mediators who are qualified to serve as the mediator in the referred case. . . . The mediator selected may be disqualified if found to have a conflict of interest or if, for any other reason, one or more of the parties establishes that the mediator cannot be expected to be impartial. Any request for replacement of the selected mediator shall be made to the mediation center.[83]

Some of the federal mediators restrict themselves to particular substantive issues with which they have an intimate knowledge.[84] It is important to remember, however, that it is the parties' responsibil-

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> Although an order has been signed sending the case to mediation, the parties may still at this time object to the alternative dispute process. General Order 95-10 reads in pertinent part:
>
> > Any party may file an objection to the reference of the case to mediation, not later than seven working days following the filing of the order . . . [referring the case to one of the mediation centers] . . . . The objection may: challenge the reference in toto if the party views the dispute as wholly inappropriate for mediation; challenge some lesser aspect of the reference, such as particular substantive matters or procedure; or alternatively, state that the parties have, themselves, selected a mediator other than one to be obtained through the auspices of the Nebraska Office of Dispute Resolution to which the mediation should be referred. The objection shall set forth the basis for the objection and in addition, if it is directed to some specific substantive matter or procedure, shall propose alternative provisions in the order which would, if adopted, resolve the objection to the satisfaction of the objecting party. Any such proposal shall first have been discussed in person or by telephone with opposing counsel or parties, unless such a discussion is shown to be impossible. Unless all parties are shown to have agreed to the objector's proposal, as soon as practicable after the filing of an objection, the judge shall confer with counsel and/or the parties in an attempt to resolve the objection so the mediation can take place. Such resolution may include making the subject of the objection itself a subject for mediation as a preliminary matter during the mediation session. If such conference resolves the disagreement raised by the objection, the judge shall enter an amended order in accordance with that resolution. If after such conference the judge is unable to resolve the objection to facilitate the mediation, he or she shall withdraw the order referring the case to mediation. During the pendency of the objection, the order of reference shall be automatically stayed. *Id.* at 3-4.

83. *Id.* at 4. *See also supra* text accompanying notes 30-32 (qualifications of federal mediators).

84. For example, John Binning, Of Counsel to Rembolt Ludtke & Berger in Lincoln, Nebraska is working on becoming a federal mediator. Because of the vast amount of work he has done in the insurance industry, he plans to primarily mediate cases involving disputes between reinsurance and insurance companies, and other business-related cases. Although he will not be allowed to interject his expertise into the discussions by giving legal advice to either party while acting in the traditional mediator role, his experience and knowledge will likely cause the process to proceed with much greater success. Interview with John Binning, Of Counsel to Rembolt Ludtke & Berger of Lincoln, Neb., in Lincoln, Neb. (Nov. 15, 1995).

ity to reach a settlement. The mediator is present, not to decide the dispute, but rather to assist the parties in listening to each other's demands. "The mediator shall be impartial and shall not express his or her own opinions or make any determination or recommendations as related to the case."[85] In this light, any one of the thirty-seven trained federal mediators in Nebraska would do an excellent job regardless what the dispute is or who the parties are.

D. The Mediation

As stated above, some commentators would argue that there are as many ways to proceed with a mediation as there are mediators. With this in mind, it is important to remember that the following is one of numerous mediation scenarios that may take place within the confines of General Order 95-10. Usually the civil procedure directed by the federal court in General Order 95-10 will be the same for every case; however, the actual mediation sessions under the control of the Nebraska Office of Dispute Resolution mediators may contain some differences. The Nebraska Office of Dispute Resolution tries diligently to apply the same mediation methods to each dispute with which it works. However, regardless of the fact that two disputes may fall under the same substantive law, each case is different and may require different applications of mediation methods.[86]

"Within twenty days of the entry of the order of referral, counsel for the parties shall confer with the staff of the mediation center to secure a date for the mediation session."[87] Again, remember that mediation is a *self-determining* process. The ball is in the parties' court, if you will, and allowing them to decide much, if not all, of the logistics of the mediation often helps the process along. If the parties are already in agreement on some of the logistical details, that may strengthen their perceptions of how willing each is to agree on other, more substantial, issues. General Order 95-10, however, states that "[t]he mediation center shall determine the date, time and place of the

85. General Order 95-10, *supra* note 12, at 5-6.

86. The variety of mediation approaches and techniques should seem natural to practicing attorneys. No two cases in litigation—no matter how similar their facts—receive exactly the same application of the rule of law or are approached with the same strategy.

87. General Order 95-10, *supra* note 12, at 4.

It is possible that before the mediation even gets started, the judge may require the parties to hold a settlement conference. This settlement conference could occur without the assistance of a mediator, however, the federal judge would be present. The federal judge, unlike a mediator, would be able to give evaluative comments about past similar cases and the strengths and weaknesses of each party's case to push the settlement proceedings along. If the parties come to the conclusion that the settlement conference by itself will not result in settlement, a mediator may then be assigned. Interview with Magistrate Judge Piester, *supra* note 41.

mediation session, taking into consideration the convenience of all persons attending."[88]

Other preliminaries will often also be decided at this time. For example, whether the parties want their respective attorneys present in the mediation may be decided. The underlying premise for not allowing the attorneys to attend the mediation is that the parties are the ones who must agree on a settlement. Plus, the ugly head of adversarialness may appear and destroy any chances of agreement.[89] Some mediations may work best if the parties attend the mediation session without their attorneys and then subsequently have the attorneys look over the agreements reached by the parties before they are signed. By proceeding in this fashion, the attorneys can provide their clients sound legal advice including realistic assessments of how the agreements compare to possible litigation results. Best of all, the parties will have come to the agreements by themselves, creating the sense of self-determination which is important to many clients.

Nebraska federal judges presently encourage parties *and their counsel* to attend all mediation sessions. In this way, all involved feel more at ease with the new process. Parties feel protected by having their attorneys by their sides, and attorneys are reassured to know that their client will not give up key negotiating points too early in the mediation process. The attorneys are also allowed to coach their clients during the mediation, within reason. This system allows the parties to have the self-determination that mediation provides because parties will be asked to answer questions and speak directly to one another and the mediator.[90] This helps resolve any issues in the dis-

88. General Order 95-10, *supra* note 12, at 4.

Although many commentators believe that allowing the parties to agree upon minor logistical issues gets the ball rolling for the more significant agreements which need to take place later in the mediation process, other commentators do not agree. For example, because negotiations on one's own turf often create power issues from the very beginning, it is usually in the mediation's as well as the parties' best interests to allow the mediator to choose a neutral third party site. Allowing the mediator to lay ground rules such as this leave the parties to concentrate on the true issues at hand instead of wasting energy worrying about whether one party appears more powerful because of who owns the room where they meet. The ODR and the Nebraska federal courts follow this philosophy.

89. Regardless whether the jurisdiction falls under the *Model Rules of Professional Conduct* (1994) or the *Model Code of Professional Responsibility* (1986), as Nebraska does, lawyers are ethically bound to zealously advocate on their clients' behalf. This contradiction with the role each party must play during the mediation process may cause quite a problem for the attorney who finds him or herself representing the client in the mediation. Because lawyers are also trained in the art of self-control, however, most should be able to, at least for short periods of time, suppress their adversarial urges.

90. This is very different from a settlement conference where only the attorneys are present, and the actual parties never meet eye-to-eye.

pute that are not legal ones.[91] At the same time, however, the attorney may be feeding her client the negotiating steps necessary to reach the *legal result* that the client wants.

Also, during the pre-mediation stage, the mediator may request that each party submit a brief written synopsis of what they see the unresolved issues to be.

> The mediator may, prior to the mediation session request or require counsel and/or the parties to supply him or her with information about the case, including material documents, exhibits and statements concerning the dispute and any prior attempts to resolve it.[92]

This information may prove very valuable to the mediator in pointing out issues on which the parties already agree but are unaware of their agreement. It will also provide the mediator with the basic background facts so the mediation will not become bogged down with the mediator trying to learn the facts during the actual mediation session. The mediator may also hold private caucuses with each party instead of or along with requesting written synopses. A caucus is simply an opportunity for the mediator to meet privately with the parties to generate ideas, options, or alternatives which might resolve the case.[93] Once again, these are mainly to allow the mediator to obtain preliminary information about the dispute so that the actual mediation process can proceed more smoothly. These caucuses also provide an excellent forum for each party to express feelings they may be experiencing and to air those biting remarks that otherwise many parties may feel compelled to blurt out during the mediation.[94] This is important to afford individuals the opportunity to ventilate their frustration, anger, and emotions prior to the joint mediation session.[95] The mediation is the time for the parties to discuss the issues; it should not be a chance for them to argue or throw disparaging remarks back and forth.

The actual mediation session must be held no later than sixty days following the entry of the order of referral, unless all parties agree to a continuance, in which case the mediation session shall be held no later than ninety days following the entry of the order of referral.[96] The Mediation Reference Order also directs:

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91. For example, one party may need to hear an apology from the other before any agreement will be reached. No such element of complete resolution exists in the traditional trial court process.
92. General Order 95-10, *supra* note 12, at 5.
93. KOVACH, *supra* note 16, at 25. Caucuses may be held prior to or during the mediation session. *Id.*
94. The reader may use his or her imagination for examples of such remarks as the author believes everyone has probably heard some of the standard repertoire. Unfortunately, this is especially true if the reader works in the legal profession.
95. KOVACH, *supra* note 16, at 25.
96. General Order 95-10, *supra* note 12, at 5.

> Except as otherwise provided herein, all parties, any insurance company having an interest, and their counsel, are ordered to attend all mediation sessions scheduled by the mediation center or the mediator. *At least one such person for each party and insurance company shall have full settlement authority. Such persons and entities are further ordered to participate in and prepare for the mediation in objective good faith.*[97]

Once the actual mediation session begins, the mediator may begin by explaining how the process will unfold. For example, the mediator may explain who gets to talk first or who the parties should address while talking.[98] It is the mediator's job to keep the parties on task discussing the disputed issues. Often, explaining to the parties how *all* will participate in achieving such a goal may increase its chances of actually occurring.

The mediator may also tell the parties at this time that everything they state during the mediation is confidential, *including* information that would be normally not confidential under the *Federal Rules of Evidence* Rule 408 exceptions.[99] Confidentiality and the use of information gained during an unsuccessful mediation at a later trial are valid concerns for all involved in mediation. A commonly stated fear among attorneys is that one party may attend the mediation session simply to learn protected information about their opponent's case with the firm intent of refusing any offer that is made.

Participants are warned, however, "that the court may impose sanctions, including, but not limited to, dismissal of a claim or defense, monetary sanctions, or such other sanctions as may be appropriate . . . under [*Federal Rules of Civil Procedure*] 16(f) should such persons or entities fail to comply with [the Mediation Reference] [O]rder in objective good faith."[100] The same sanctions applying to settlement conferences apply to mediation sessions. The obvious purpose of these sections is to have a person present who can settle the case during the mediation without consulting someone else who is not present, and to stop attorney fears about bad faith mediation participation from becoming a reality. Because of the importance of this particular issue, it will be discussed separately in section III.G of this Commentary.

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97. United States District Court for the District of Nebraska, Mediation Reference Order 2, 2-3 (draft form-order)(emphasis added)(on file with the University of Nebraska-Lincoln College of Law Library).

98. Although this sounds like a trivial point, having one party tell the mediator his or her side of the story while the other party attentively listens often proves to be a successful settlement technique. Subsequently requiring the listening party to repeat what he or she has just heard makes the negotiations very effective.

99. General Order 95-10 states that everything said in mediation is confidential; plus it goes one step further and excludes major exceptions that Rule 408 of the *Federal Rules of Evidence* creates. *See infra* section III.G.

100. Mediation Reference Order, *supra* note 97, at 3.

Whether or not the parties have submitted pre-mediation information to the mediator, "counsel for the parties and the parties themselves may be required to present information reasonably necessary for the mediator to understand the issues presented and the interests of the parties in settlement."[101] "The mediator shall conduct an orderly settlement negotiation with the parties and their counsel, identifying issues, generating options, and proposing solutions to the dispute."[102]

In the best case scenario, the mediation will continue until the parties agree on all of the disputed issues. The process may include breaks between two or three individual mediation sessions where the parties can consult with their respective attorneys about the progress being made in the mediation. In Nebraska federal courts, a maximum of four hours is allotted for the first actual mediation session. The minimum benefit achieved in this four hour time period for the first session must be that at least the parties are hearing one another. If the parties have not reached this minimum stage after four hours, the mediator ends the mediation. If the parties believe that mediation is working for them and want to continue negotiating with the mediator's professional assistance, they must jointly agree to go forward with the mediation.

At some point in the first session or a later session, all parties hopefully will reach an agreement resolving the dispute. The necessary documents are then drawn, and the parties sign. The mediator reports the resulting settlement to the court.[103]

> Within five working days of the conclusion of the mediation process, the mediation center shall report to the clerk of the appropriate court whether the case has been settled, whether a partial resolution has been reached, and whether the fees for the mediation have been paid by the parties responsible for them, and if not, the amount of unpaid fees and the responsible party or parties. Information about the substance of the parties' agreement shall not be provided without their consent.[104]

Finally, payment is due to the mediation center,[105] and the parties and their counsel are individually asked to complete evaluations of the mediation process.[106]

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101. General Order 95-10, *supra* note 12, at 5.

102. *Id.*

103. If the mediation is successful in resolving the dispute, the parties will motion the court to dismiss the case. Once the case is dismissed, the federal court no longer has jurisdiction over it. If a particular party refuses to comply with a provision of any agreements executed by the parties in the mediation, state contract law will apply. The same principles governing settlement agreements apply to mediation agreements.

104. General Order 95-10, *supra* note 12, at 6.

105. *See infra* section III.F.

106. The evaluations are simply a series of questions to be answered by circling a number from 1 to 5—with 1 representing "Excellent!" and 5 representing "Terri-

In the worst case scenario, the parties find they can not agree on one or more of the unresolved issues, and the mediator agrees there is a deadlock. "In the event the case has not settled, the clerk shall notify the assigned district, magistrate, or bankruptcy judge for the purpose of the entry of an order restoring it to the active docket of the court, including trial."[107]

Because the federal judge only stays the proceedings, the case goes back to the judge no matter what the result in the mediation. If the parties reached a full agreement, the judge may require a hearing where each party states that he or she is satisfied with the settlement and requests the court dismiss the action. Such a proceeding is very rare. The usual practice entails the parties' attorneys filing the appropriate documents with the court explaining the successful mediation and requesting dismissal. The judge then dismisses the case and it is removed from his or her docket.[108]

Even if the parties do not completely agree, more is gained than lost by the effort expended in the mediation process. Some of the issues that would have had to have been litigated may now be removed from the trial by joint-stipulation because of the parties' agreement on them. This saves limited judicial, client, and attorney resources. The unresolved issues are then set for trial, and the case proceeds only on them. The option does exist for parties, after more discovery, to decide that they want to return to the mediation process. If the judge believes the parties are sincere about their willingness to retry mediation and are not simply trying to get a continuance, they are allowed to do so.[109]

E. Other Filings and Motions

Because the federal judge has stayed the proceedings, no filings or motions may be filed during the mediation process unless mutually agreed upon by all parties and counsel. As stated above, if the parties agree that more discovery is necessary before either can make an informed decision about what to agree to in the mediation, the court

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ble!". Evaluation of Mediation—Attorneys; Evaluation of Mediation—Parties and Insurers. Attorneys and clients must separately complete the evaluations because too often what one believes was a terrible experience may very well have been satisfying to the other. A client, for example, may find the mediation process and result reached "excellent," while his or her attorney may vehemently dislike both. Because attorneys serve their clients, it is what the client perceives that is most important.

107. General Order 95-10, *supra* note 12, at 6.

108. Depending upon how sensitive the nature of the dispute is, or the privacy wishes of the parties, they may also agree that the settlement remain sealed from public view. Such wishes follow the same rules as settlements which occur prior to trial without the help of mediation.

109. Interview with Magistrate Judge Piester, *supra* note 41.

may allow the parties to proceed with discovery for a limited period of time and then return to a mediation session. All of the parties would have to agree to such a progression.

F. Costs

In Nebraska, the parties share in the costs of the federal mediation, unless the mediated settlement includes payment of one party's mediation fee by another party or the parties and the mediator have agreed otherwise in writing.

> *Fees for Mediation.* The cost of the mediation service shall be borne by the parties to the mediation session at the rate established in conjunction with the mediation center, not to exceed $100.00 per hour total, which can be divided equally or on some pro rata basis as decided by the parties.[110]

The total fee including expenses charged all parties by the mediation center shall not exceed the sum of $400.00 for the entire mediation unless the parties and the mediation center otherwise agree in writing.[111]

At some point toward the conclusion of the mediation proceeding, the mediation center will inform the attorneys to ask their clients to bring in their checkbooks. The parties must make arrangements with the mediation center to determine and pay the mediation fee within five working days after the mediation session.[112] "In the event the mediation fees, or some portion thereof, have not been paid, the clerk shall note such fees, and such fees shall be included in the computation of any judgment entered in the case."[113] It is possible also, just as in any case, that a party may proceed *in forma pauperis* and have his or her fees paid from the Federal Practice Fund.

Even though mediation may in some cases be simply another step in the process toward trial, resources expended on preparing and attending mediation are usually well spent. Discovery information obtained prior to or in the interims of mediation sessions may be used at trial as long as it does not violate the confidentiality rules discussed below. Furthermore, in most cases the parties will have reached some

110. General Order 95-10, *supra* note 12, at 7.

111. The $400.00 cap is based on the maximum $100.00 per hour rate that the mediation center may charge and the four hour time limit imposed by General Order 95-10. The four hour time limit, once again, is based on the premise that if the parties are so uncooperative that they have not reached the stage of agreeing to continue mediation after four hours, the court will not force them to further expend money on the process.

112. Mediation Reference Order, *supra* note 97, at 4 (draft form-order).

113. General Order 95-10, *supra* note 12, at 7. It is also possible that "[j]udgment for the mediator or mediation center may be entered for payment of such fees, whether or not the mediation is successful, without advance notice if the fees are not timely paid." Mediation Reference Order, *supra* note 97, at 4 (draft form-order).

agreements during the mediation which may now be stipulated at trial. At the least, costs associated with unsuccessful mediation attempts may be offset against trial expenses. The bottom-line is clear: mediation efforts preserve limited judicial resources, client funds, and attorney resources.[114]

G. Evidentiary Concerns: Confidentiality and Admissibility

Issues of confidentiality and privilege are central to the mediation process. They are also, however, confusing and often fear-inducing. There has been a large amount of scholarship produced regarding how confidentiality and privilege fit into different areas of the law and how they interact with one another.[115] Congress and the Supreme Court have failed to provide clear rules, however, to make this area of law understandable. Inconsistencies regarding the application of these principles, therefore, abound between state courts and within federal courts.

General Order 95-10 seeks to eliminate some of the confusion by simplifying the rules. At the beginning of the mediation, the mediator must "clearly inform the parties of the attorney-mediator's role as a mediator, including the confidentiality of the process, and of the fact that there is no attorney-client privilege[116] or relationship between the attorney-mediator and any party."[117] Furthermore, General Order 95-10 states:

> *The mediation session(s) constitute settlement negotiations. Notwithstanding the provisions of Rule 408, Fed. R. Evid., all statements, whether written or oral, made* ***only*** *during the course of the mediation proceeding shall be deemed to be confidential and shall not be admissible in evidence for* ***any*** *reason in the trial of the case, should the case not settle.*[118]

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114. For a discussion regarding basic steps lawyers and their clients can take to help ensure that ADR, in fact, saves time and money and otherwise fulfills its purposes, see Kelly P. Corr & David R. Goodnight, *Making ADR Cost Effective: Simple Tips to Make ADR Work for You*, *in* LITIGATION 1993, at 517 (PLI Litig. & Admin. Practice Course Handbook Series No. 481, 1993).

115. For scholarship discussing confidentiality in mediation, see Kent L. Brown, *Confidentiality in Mediation: Status and Implications*, 1991 J. DISP. RESOL. 307.

116. For discussions regarding confidentiality as well as other ethical dilemmas such as mediator/attorney-client privilege through an empirical eye, see Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1; Mori Irvine, *Serving Two Masters: The Obligation Under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation*, 26 RUTGERS L.J. 155 (1994); Richard A. Salem, *Ethical Dilemmas or Benign Neglect?*, 1994 J. DISP. RESOL. 71; Linda Stamato, *Easier Said Than Done: Resolving Ethical Dilemmas in Policy and Practice*, 1994 J. DISP. RESOL. 81; Joseph B. Stulberg, *Bush on Mediator Dilemmas*, 1994 J. DISP. RESOL. 57.

117. General Order 95-10, *supra* note 12, at 10.

118. *Id.* at 6 (emphasis added).

The confidentiality rule in mediations in federal courts in Nebraska is very simple—Every statement made during the course of the mediation is confidential.

General Order 95-10 vetoes the exclusions to confidentiality created by the last sentence of *Federal Rules of Evidence* Rule 408 for statements made "*only* during the course of the mediation proceeding[.]"[119] In other words, a party shall *not* later offer evidence discovered during the course of a mediation proceeding "for another purpose[,] such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution[,]" although Rule 408 would normally allow the offering. General Order 95-10, however, does uphold the third sentence of Rule 408 that "any evidence otherwise discoverable" need not be excluded "merely because it is presented in the course of" a mediation.

This simplicity causes the standards of confidentiality and admissibility of statements during the mediation to be the most strict as compared to any other application of these types of rules. Such guarantees of confidentiality should make clients and their attorneys more at ease with the mediation process.

IV. FRIENDLY ADVICE

This section is intended to offer some friendly advice or constructive criticism, whichever the reader may be more likely to accept, to lawyers who find themselves working for a client with a case designated for mediation.[120] The best thing the lawyer can do for his or her client during the mediation is "Be quiet!" It is the client's dispute, and mediation is the client's opportunity to fix it him or herself. Attorneys have to realize that often the legal issues are only a small part of the dispute. Many parties will have to continue some sort of a relationship *after* the immediate dispute is resolved. Litigation most often locks people into their anger because it does not offer them an opportunity to address any issues in the dispute except the legal ones. Mediation, on the other hand, allows the parties to put the dispute behind them once *all of the issues* are resolved.

As stated above, attorneys play an important part during the mediation in that they support their clients by being available to answer questions about how accepting a particular legal offer may compare to the result if litigation were pursued. Attorneys are encouraged to

119. *Id.*

120. Although none of the following advice is quoted from any particular person, the author did not learn the helpful hints from experience. However, rather than disclose the source, let the reader be advised that a source with much experience does exist (Hint: look back over this Commentary's citations to see whom the author interviewed).

coach their clients on the legal issues before attending the mediation session. Attorneys should also instruct their clients that the clients need to be ready to talk at the mediation. For mediation to be at all successful, the attorney cannot be the mouthpiece for the client. Finally, if as the attorney you suddenly feel compelled to say something at the mediation, please speak with a conciliatory tone.[121] By following this advice, the attorney will be working for the client to the best of his or her abilities.

V. CONCLUSION

In the end, lawyers and parties will be pleased to have the federal mediation alternative available. General Order 95-10 will create speedier dispositions, reduce litigation costs, and eliminate or at least substantially shorten delay. "When trial lists are reduced to manageable sizes, cases not suitable for ADR can be tried and access to justice becomes a reality[.]"[122]

As tort reform proponents continue to sound-off about the so-called "litigation explosion",[123] Congress will no doubt consider new legislation relevant to ADR in the federal courts. It is each attorney's professional responsibility, whether a member of the bar or not, to understand this new dispute resolution process called mediation. Only by learning not to fear it will we ensure federal legislation and local rules are passed which further, instead of restrict, this exciting new development in the law.

Because General Order 95-10 is very new and still in the experimental stage, it is too early to make definitive judgments concerning its relative advantages and disadvantages. The federal bench and Nebraska Bar should be commended on their acceptance of this program to date. Let us hope we all remember when we find ourselves for the first time facing the General Order 95-10 Mediation Plan, that we are all interested foremost in "the just, speedy, and inexpensive determination of every action."[124] And, do not forget, "[C]ompromise whenever you can[!]"[125]

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121. "Conciliatory" or "conciliate" are defined as:
> to bring together; win over; soothe the anger of; make friendly; placate; gain regard, good will, etc., by friendly acts; reconcile; and pacify.

WEBSTER'S NEW WORLD DICTIONARY 294 (2d college ed. 1976).

122. Levin and Golash, *supra* note 2, at 43 & n.114.

123. *See supra* note 36.

124. FED. R. CIV. P. 1.

125. Wainscott & Holly, *supra* note 1, at 1 (quoting Abraham Lincoln).